87-1819

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

BARBARA VARANESE,
Petitioner,

vs.

TONY GALL, *et al.;* LAKE-GEAUGA PRINTING COMPANY, d.b.a. GEAUGA TIMES LEADER, *et al.,*
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTIONS PRESENTED FOR REVIEW

I. THE *ANDERSON V. LIBERTY LOBBY* STANDARD DOES NOT, AND SHOULD NOT, SUPPLANT OHIO RULE OF CIVIL PROCEDURE 56, TO THE END THAT THE SUMMARY JUDGMENT MOTION VEHICLE REPLACES A TRIAL.

II. THE ACTUAL MALICE TEST, AS IMPOSED UPON THIS PETITIONER BY THE OHIO SUPREME COURT, OPERATES AS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO A JURY TRIAL AND OF OPEN ACCESS TO THE COURTS.

II.

PARTIES BELOW

The parties below include: Tony Gall, Edna Davis, Carl Manfredi, Dean Schanzel, The Lake-Geauga Printing Company dba Geauga Times Leader and Maple Leaf Shopper, Thomas V. Martin dba Chesterland News, Suburban Communications, Inc. dba Good News, and Town and Country Publishing and Litho Company dba Town and Country Trader.

All of the above parties except Lake-Geauga Company dba Geauga Times Leader, were either dismissed by the trial court on Motions for Summary Judgment or settled with the Petitioner.

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IN THE

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CITATIONS TO OPINIONS BELOW

The citation to the decision of the Ohio Supreme Court is *Varanese v. Gall* (1988), 35 Ohio St. 3d 78, set forth in the Appendix at p. A1. The decision of the Geauga County Court of Appeals is unreported and is set forth in the Appendix, *infra*, at page A23. The written decision of the trial court is set forth in the Appendix, *infra*, at p. A32.

JURISDICTIONAL STATEMENT

Petitioner, Barbara Varanese, prays that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered on February 3, 1988, which reversed the judgment of the court of appeals insofar as it pertained to Lake-Geauga Printing Company, d.b.a. Geauga Times Leader and Maple Leaf Shopper, and reinstated the judgment of the trial court.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION:

> **§16 [Redress in courts.]**
>
> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
>
> **[Suits against the state.]** Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

OHIO RULE OF CIVIL PROCEDURE 56.

See, Appendix at p. A45.

STATEMENT OF THE CASE

A. Summary of Procedural History.

Petitioner, Barbara Varanese (hereinafter "Petitioner" or "Barbara Varanese"), initiated a libel action against various newspapers and third parties, including the respondent, Lake-Geauga Printing Co. (hereinafter "Lake-Geauga"), for the publication of a defamatory advertisement[1] which was used to defeat the petitioner in her bid for the position of Geauga County Commissioner in the November, 1982 General Election. At the time of the defamatory publication, the petitioner was the elected Treasurer of Geauga County and was very popular with the voters.

Following discovery in the case, Lake-Geauga moved for Summary Judgment and petitioner opposed. On or about March 29, 1985, the trial court rendered its written Opinion, granting the Respondent's Motion for Summary Judgment, and finding that as a matter of law the petitioner had failed to prove that Lake-Geauga had acted with "actual malice" in approving the subject ad for publication and circulation.

Petitioner timely appealed the decision of the trial court in granting summary judgment to the newspaper defendants.

The Eleventh District Court of Appeals affirmed the dismissal of the claims against the other newspapers, but reversed the trial court's grant of Summary Judgment against the defendant, Lake-Geauga. The Court of Appeals' reversal was based on the Court's examination of the record and the Court's finding that:

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[1] A copy of the ad in question appears in the Appendix (A16 & A17) as Appendix I to the Opinion of the Ohio Supreme Court, and can be found as a fold-out at page A49 of the Appendix.

> Here, considering the evidence in the light most favorable to Varanese, a jury could reasonably infer that Curran's testimony raised serious doubt as to the truthfulness of the ad. Likewise, in the same light, a jury could reasonably infer that the *Times-Leader staff lacked good faith by sitting back, playing dumb, and claiming reliance on the integrity of the Geauga County Republican Leaders* who submitted the ad to them for publication. Thus, the record contains evidence from which a jury could determine with convincing clarity that Lake-Geauga Printing Co. published the advertisement with actual malice, that is, with a high degree of awareness of its probable falsity. (Emphasis added.)

(App. A28).

The Respondent, Lake-Geauga Printing Co., filed a Memorandum in Support of Jurisdiction with the Ohio Supreme Court, which was granted. On February 3, 1988, the Ohio Supreme Court reversed and held that the petitioner, Barbara Varanese, failed to present evidence in opposition to a motion for summary judgment, from which a reasonable jury could find actual malice with convincing clarity.

B. Statement of Facts

In 1982, the petitioner, Barbara Varanese, was a Democrat and the elected Treasurer of Geauga County, Ohio. During her second term in office, she sought the office of Geauga County Commissioner. Her opponent for that position was Tony Gall, a Republican.

In September, 1982, Dean Schanzel, Chairman of the Geauga County Republican Party, recommended, based upon the results of a preference poll, that Gall distribute an anti-Varanese ad to attract the negative voters to the voting booth. Schanzel also asked Edna Davis, a political enemy of the petitioner, to research and compile negative campaign material for use against the petitioner. In early

October, Davis prepared a two-page negative campaign leaflet to be used against Barbara Varanese in the upcoming election. Schanzel and Carl Manfredi, the manager of Tony Gall's campaign, condensed the ad into a political format which was subsequently approved by Gall for dissemination by the respondent newspapers, including the *Lake-Geauga Times Leader.*

Lake-Geauga Printing Co. is the publisher of the *Geauga Times Leader* and *Maple Leaf Shopper* (a shopping guide published by the *Geauga Times Leader*). In September, 1982, the *Geauga Times Leader* was the only daily newspaper in the county, with a paid circulation of approximately nine to ten thousand subscribers (Thompson Depo. 1, 62-64). The *Maple Leaf Shopper* was a weekly shopping guide mailed to approximately fifteen thousand households (Thompson Depo. 79-80, 137-139).

In mid-October, the Gall campaign submitted the text of a full-page advertisement to the *Times Leader* for publication on October 25th and November 1st, 1982. The election was held November 2, 1982 (The ad is contained in Appendix at A49).

The ad submitted by the Gall campaign charged Barbara Varanese, in her capacity as the Geauga County Treasurer, with conduct amounting to misfeasance, malfeasance, and nonfeasance in public office. The advertisement also enumerated a long list of accusations against the petitioner with incomplete footnotes accompanying each charge. In two of the footnotes, the *Geauga Times Leader* was denominated as a source for the accusations in the ad (A49).

Herbert Thompson was the general manager of the *Geauga Times Leader,* and as such, final approval of the Varanese ad rested with him (Thompson Depo. 36;

Curran Depo. 38). Contrary to Waddell's affidavit, Thompson also saw the Varanese ad on either the Thursday or the Friday prior to its initial publication (Thompson Depo. 122; Curran Depo. 16).

Robert Curran was the newspaper's editor, who had a long career with various newspaper chains throughout the country. Curran observed Thompson reviewing the ad and went over to read it himself (Curran Depo. 15, 16, 41). Curran's reaction to the ad was vehement. Curran told Thompson (and later, the petitioner) that the ad was "bullshit" and libelous. Curran cautioned Thompson against printing the ad because he had serious reservations about the truthfulness of the accusations contained therein (Varanese Depo. 143-145, 158-161, 164-165; Curran Depo. 17-23, 41-47, 53).

Thompson ignored his editor's advice and the ad was published in the October 25, 1982 and November 1, 1982 *Geauga Times Leader* with a copy of the advertisement appearing in the *Maple Leaf Shopper* on the latter date.

Despite Curran's concerns about the truthfulness of the ad, the staff of the *Geauga Times Leader* made no conscious efforts to verify or corroborate the statements appearing in the ad or accompanying footnotes (Thompson Depo. 69, 163-165). A simple check of prior news articles, the reporters who covered the political beat and/or the public documents which the newspaper had in its possession, would have readily disclosed the false and defamatory nature of the accusations contained in the Varanese ad (Varanese Depo. 105-107, 132-134, 137-139).

As a result of the political ad published by the respondents in this case, the petitioner, Barbara Varanese, was defeated for election to the County Commissioner's seat on November 2, 1982, by a narrow margin.

REASONS FOR GRANTING THE WRIT

I. THE *ANDERSON V. LIBERTY LOBBY* STANDARD DOES NOT, AND SHOULD NOT, SUPPLANT OHIO RULE OF CIVIL PROCEDURE 56, TO THE END THAT THE SUMMARY JUDGMENT MOTION VEHICLE REPLACES A TRIAL.

In Ohio, the summary judgment rule, which sets forth the guidelines for the motion and the proceedings thereon, is Rule 56 of the Ohio Rules of Civil Procedure (Appendix A45). Its terms are substantially identical to those of Federal Rule 56. Consequently, the analysis used by the Court when determining whether to grant or deny said motion is the same at the federal as well as the state level. A motion for summary judgment should be granted only when:

(1) There is no genuine issue of material fact;

(2) The movant is entitled to judgment as a matter of law; and

(3) Reasonable minds could conclude only in favor of the movant after construing the evidence most strongly in favor of the non-movant.

Harless v. Willis-Day Warehousing Co. (1978), 53 Ohio St. 2d 64; *Temple v. Wean* (1977), 50 Ohio St. 2d 317.

The rule, and the standards for its application, have not been altered by *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. _____, 91 L. Ed. 2d 202. What that case has done is fine-tune the summary judgment procedure as it applies to a public figure libel action. As has been the practice in Ohio, and as it has evolved through judicial pronouncement, a summary judgment motion cannot be defeated by just any disputed fact, but only by a genuinely disputed material fact. *Anderson, Id.* at

211. The evidence propounded by the non-movant is to be given credence and all "justifiable" inferences shall be accorded him. *Anderson, Id.* at 216. Once a motion for summary judgment is asserted, both plaintiff and defendant have burdens which they must sustain:

> . . . The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict . . .

Anderson, Id. at 217.

These generalized concepts operate in a defamation case in this way: A summary judgment will lie if there is no genuine dispute on the issue of actual malice. Additionally, a plaintiff's case will survive if the evidence will support a jury finding of actual malice using the clear and convincing standard.

A common thread can be discerned running through all the First Amendment-libel cases handed down by our Ohio Supreme Court and by the United States Supreme Court. The persistent idea is that the summary judgment tool should be plied with caution. *Poller v. Columbia Broadcasting System* (1962), 368 U.S. 464; *Hutchinson v. Proxmire* (1979), 443 U.S. 111; *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116, *cert. denied* (1981), 452 U.S. 962; *Bukky v. Printing Co.* (1981), 68 Ohio St. 2d 45; and *Anderson v. Liberty Lobby, Inc., supra.* The *Anderson* court examined the summary judgment procedure in a number of contexts other than libel, and cited the case of *Kennedy v. Silas Mason Co.* (1948), 334 U.S. 249, for the following proposition:

> Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny

> summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial.

Anderson, supra at 216.

Historically, when faced with a summary judgment motion and the opposition package, a trial judge has not taken it upon himself to weigh the evidence. That is the exclusive province of the jury. This is still the state of the law in libel cases, despite the *Anderson* decision which refers to a "quantum" of evidence needed to support a jury verdict. Litigants in Ohio defamation cases have been able to rely upon this concept of the judge's role versus the jury's role with some consistency until the Ohio Supreme Court's decision in the within matter on February 3, 1988. For instance, in *Dupler, supra* at 121, the Court enunciated the test for evaluating a motion for summary judgment:

> In ruling on such a motion, the court is limited to examining the evidence 'taking all permissible inferences and resolving questions of credibility in plaintiff's favor to determine whether a reasonable jury acting reasonably could find actual malice with convincing clarity. (Citation omitted.)

When the petitioner, Barbara Varanese, brought her claim before the Ohio Supreme Court, that court took a significant leap beyond precedent and expanded the role of the trial court. That is, when considering whether or not plaintiff has demonstrated actual malice with convincing clarity, the court is now mandated to perform an "independent review" of the evidence. This is simply another way of saying "weigh the evidence". Although it is agreed that a defamation plaintiff must produce evidence supportive of a jury verdict in his or her favor, is it appropriate to place that evidence on the scales at

the motion stage of the proceedings? Unfortunately for public-figure libel plaintiffs, this is the genesis of a troubling precedent.

The fact pattern in the instant matter sets up a genuine material issue so that summary judgment is inappropriate. At 35 Ohio St. 3d 79, 80, the actual malice standard is spelled out as follows:

> A defamation plaintiff who is required to show actual malice must demonstrate, with convincing clarity, that the defendant published the defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity.

Robert Curran was an editor at the *Geauga Times Leader* during the relevant time period and Herbert Thompson was the general manager there. Curran's deposition testimony is illustrative:

> Q. And while the ad was laying there (on the advertising counter), did you say anything to Mr. Thompson concerning the ad?
>
> A. Yes, I did.
>
> Q. And tell these folks what you told Mr. Thompson?
>
> A. I said it was bullshit.
>
> Q. Any why did you say that?
>
> A. I said it because it appeared to be, and it was, a listing of specific apparent charges from one candidate to another, and using as reference points, these numbers which appeared, which reference to footnotes, and which included in them were the *Geauga Times Leader.* The *Geauga Times Leader* was our newspaper, and I said, "It is bullshit. We can't use this."

Q. Why could you not use that, in your judgment?

A. In my judgment, to have specific charges of possible wrongdoing referring to our newspaper by name as the source of this information would be a problem to us if these charges were not accurate.

(Curran Depo. 17-18).

Q. What else did you tell him? Again using your exact words on that day . . . as to the best you can recall?

A. I used the word libel because I felt that if these statements would be questioned, and let us say if they were proven to be false, that we would have to be included, because we are supporting the false statements. We would be tied in. We are linked to it.

Q. Did you use these words as you were talking to Mr. Thompson or are you just explaining to us now why you said those things?

A. I said they are quoting the *Geauga Times Leader* to say she has done something wrong.

Q. Did you use those words specifically?

A. Yes, I said we don't know these are true. I said—I remember asking him, "Do you know whether these are true?" And I don't recall him answering at all, and we can't let our name be tied to these charges.

Q. Okay. Have you related to us now absolutely everything you told Mr. Thompson that day in October in the advertising section of the *Geauga Times Leader.*

A. I believe I used the word libel twice. I believe I used the word charges probably three times. I don't think I said maybe a total of maybe 50 words, and I don't think he said maybe 20 back to me.

Q. When he replied, how did he reply?

A. It was "I am handling it, don't worry about it. It is none of your business."

(Curran Depo. 46-47).

Conceding that the ultimate decision to publish rests with the general manager, Herbert Thompson, cannot an editor's sincere suspicion or trepidation (verbally communicated) be imputed to the general manager? Certainly, knowledge *is* imputed in a variety of situations, and, as a consequence, liability is imposed upon the secondary entity (principal-agent; corporate mergers and successor liability; *respondeat superior*, etc.). Once a fact is related to someone, is it not absorbed and incorporated into the listener's bank of knowledge? At the very least, the degree of Mr. Thompson's knowledge or awareness of the character of the political ad, after his conversation with Curran, is an issue for the reasonable minds of a jury to weigh. The identical dilemma, which confronted Chief Justice Celebrezze in his dissenting opinion in *Bukky v. Printing Co., supra* at 50, looms largely here:

> . . . I cannot see how anyone, at this stage in the case, could conclude that, taking all permissible inferences in plaintiff's favor, a reasonable jury, acting reasonably, could *not* find actual malice with convincing clarity.

II. THE ACTUAL MALICE TEST, AS IMPOSED UPON THIS PETITIONER BY THE OHIO SUPREME COURT, OPERATES AS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO A JURY TRIAL AND OF OPEN ACCESS TO THE COURTS.

An examination of the entire record of proceedings below will reveal that this issue was not addressed. However, this is due to the unique procedural posture of this case; and, therefore, should not bar consideration at this level. This case never reached a full trial on the merits. Above all, the stringent application of the actual malice test and the inappropriate weighing of the evidence of state of mind did not occur until this petitioner was before the Ohio Supreme Court, from whose decision she seeks review by *certiorari*.

The language of the Ohio Constitution on the right to trial and the availability of the courts and their processes is strong and sweeping.

> ART. I, §16. REDRESS IN COURTS.
>
> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Given this powerful statement and the rights afforded citizens by the U.S. Constitution, a public-figure libel litigant has the right to a full and fair adjudication in all states. Petitioner is not seeking uniformity, for that is never guaranteed. By the same token, no one, including Barbara Varanese, is owed a victory. Nevertheless, she and other litigants are entitled to pursue their claims beyond the motion stage and present their cases to a jury of their peers when the evidence warrants it.

Poller v. Columbia Broadcasting System (1962), 368 U.S. 464; *Hutchinson v. Proxmire* (1979), 443 US 111; and *Bukky v. Printing Co.* (1981), 68 Ohio St. 2d 45 acknowledge that the trial court's probe of a summary judgment motion in a public-figure defamation case is subjective.[2] It is an uncharted exploration of a state of mind. Does the summary judgment inquiry plumb deeply enough? Even with the availability of affidavits and depositions to assist in gazing into the mind of a publisher, there surely will be cases in which a reasonable jury will need to sue a witness and assess his demeanor and credibility.

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[2] (a) . . . We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation *where motive and intent play leading roles.* (Emphasis added.) *Poller v. Columbia Broadcasting System* (1962), 368 U.S. 464, 473.

(b) Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964), and does not readily lend itself to summary disposition. *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120, fn 9.

(c) First, recent precedent of the United States Supreme Court has sounded a note of caution with respect to granting summary judgment in First Amendment libel cases. Where a reporter's or editor's "state of mind" or "subjective awareness of probable falsity," motion or intent is the focal point of the case, the court has expressed some doubt as to the propriety of rendering summary judgment. *Bukky v. Printing Co.* (1981), 68 Ohio St. 2d 45, dissent at 49.

In a recent pronouncement of the Ohio Supreme Court, *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St. 3d 215, Justice Holmes expressed his very real concern in his dissent at 222:

> . . . Where triable issues of this magnitude are before this or any other court, it is imperative that such occurrences be exposed to the full light of trial. Contrary to the majority view, the United States Supreme Court has stated that summary judgment is generally not utilized to decide a defamation case where the publisher's state of mind is called into question under the "actual malice" standard. See, e.g., *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120, at fn. 9; *Wolston v. Reader's Digest Assn., Inc.* (1979), 443 U.S. 157, 161, at fn. 3.

Justice Brennan, in his dissent in *Anderson v. Liberty Lobby, Inc., supra*, visualizes the bleak new world of public-figure libel law under a standard like the one imposed here. In this dark futureworld, he sees chaos among the courts:

> . . . This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

Anderson, supra, Brennan dissent at 222.

Justice Brennan confronts yet another fearful vision in his dissenting opinion at 223:

> I simply cannot square the direction that the judge 'is not himself to weigh the evidence' with the direction that the judge also bear in mind the

> "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quality" to meet that "quantum." I would have thought that a determination of the "caliber and quality," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount required could *only* be performed by weighing the evidence.
>
> * * * * *
>
> Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Since the Ohio Supreme Court did not deem the evidence put forth by the petitioner, Barbara Varanese sufficient under the actual malice standard, it is hard to imagine what fact pattern and evidence would open the courthouse doors and bring a litigant before a jury. Previously, circumstantial evidence has been admissible to establish actual malice. The within case rises above circumstance. An editor expresses serious doubts and reservations about a piece of ad copy. He communicates those misgivings to his general manager. Even after being alerted to the potential problem, the general manager chooses to publish without verifying the statements. Although the means for checking the facts lay in the newspaper's morgue, the general manager still chooses not to investigate. Short of a confession of actual knowledge or an admission of awareness of falsity, what more could the Court demand of a litigant in opposition to defendant's motion for summary judgment?

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 3, 1988)

No. 87-636

THE SUPREME COURT OF OHIO

COLUMBUS

BARBARA VARANESE,
Appellee,

vs.

TONY GALL, *et al.;* LAKE-GEAUGA PRINTING CO., d/b/a GEAUGA TIMES LEADER, *et al.,*
Appellants.

[Cite as Varanese v. Gall (1988), 35 Ohio St. 3d 78.]

Defamation—Actual malice in defamation cases contrasted with common-law standard of malice or actual malice—Newspapers—Liability for failure to check accuracy of advertisements, including political ones, determined, how.

O. Jur. 3d Defamation §§41, 55.

1. The concept of actual malice in defamation cases involving public officials is separate and distinct from the traditionally defined common-law standard of malice or actual malice. Actual malice in the context of defamation may not be inferred from evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motives for publishing are irrelevant. A defamation plaintiff who is required to

show actual malice must demonstrate, with convincing clarity, that the defendant published the defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity.

2. In defamation cases, a newspaper's liability for failure to check the accuracy of advertisements, including political advertisements, is limited to those cases where the defendant actually knew the ad was false before publication, or where the ad is so inherently improbable on its face that the defendant must have realized the ad was probably false.

APPEAL from the Court of Appeals for Geauga County.

On October 21, 1983, plaintiff-appellee, Barbara Varanese, brought this action against defendant-appellant, Lake-Geauga Printing Company, d.b.a. Geauga Times Leader and Maple Leaf Shopper, and others, alleging that she had been defamed by a paid political advertisement appearing in appellant's publications, the Geauga Times Leader and the Maple Leaf Shopper. The advertisement was submitted for publication by the Committee to Elect Tony Gall, who wsa running against appellee for the position of Geauga County Commissioner. At the time the ad was published, appellee was Geauga County Treasurer. The ad[1] charged appellee with various acts of misfeasance and nonfeasance in office, and characterized her as advocating the elimination of various services, including those supporting veterans, the aged, and conservation, as well as the termination of support for 4-H programs.

[1] See Appendix 1, *infra*, at 86-87 [A16-17]. As it originally appeared in the Geauga Times Leader on November 1, 1982, the advertisement measured a full page. It was printed in black, red and blue ink, with the name "Tony Gall" at the bottom in blue block letters one inch high.

The ad provided footnotes to the allegations, several of which cited the Geauga Times Leader as a source thereof. Appellee lost the election.

Appellant filed a motion for summary judgment, asserting that as a public official, appellee is required to show that appellant acted with actual malice, and that appellee can produce no evidence sufficient to demonstrate such actual malice with convincing clarity. Appellee responded with evidence which she alleged showed actual malice on the part of appellant. The trial court granted appellant's motion and entered final judgment in favor of appellant.

The court of appeals reversed this judgment in part, holding that "*** the record contains evidence from which a jury could determine with convincing clarity that Lake-Geauga Printing Co. published the advertisement with actual malice, that is, with a high degree of awareness of its probable falsity."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Don C. Iler Co., L.P.A., and *Don C. Iler*, for appellee.

Gallagher, Sharp, Fulton & Norman, *Forrest A. Norman* and *James M. Speros*, for appellant.

DOUGLAS, *J.* The instant appeal poses a single question: Did appellee present evidence sufficient to withstand appellant's motion for summary judgment on the issue of actual malice? For the following reasons, we hold that she did not.

The parties to this appeal do not dispute appellee's status as a public official. As such, appellee bears the burden of proving, with convincing clarity, that appellant published the advertisement at issue with

actual malice. *New York Times Co. v. Sullivan* (1964), 376 U.S. 254; *Bukky v. Printing Co.* (1981), 68 Ohio St. 2d 45, 22 O.O. 3d 183, 428 N.E. 2d 405, syllabus. Our initial inquiry, therefore, must focus on what constitutes actual malice in defamation cases.

We note at the outset that the concept of actual malice in public-official defamation cases involving media defendants should not be confused with the traditional common-law standard of actual malice. In the common law, actual malice connotes ill will, hatred, a spirit of revenge, or a conscious disregard for the rights and safety of other persons which has a great probability of causing substantial harm. *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 512 N.E. 2d 1174, syllabus. These elements are constitutionally insufficient to prove actual malice in the context of a public-official defamation case under *New York Times Co. v. Sullivan, supra. Cantrell v. Forest City Pub. Co.* (1974), 419 U.S. 245. Evidence of hatred, spite, vengefulness, or deliberate intention to harm can never, standing alone, warrant a verdict for the plaintiff in such cases. *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St. 2d 116, 119, 18 O.O. 3d 354, 356, 413 N.E. 2d 1187, 1190. This is because the focus of inquiry is *not* on the defendant's attitude toward the plaintiff, but rather on the defendant's attitude *toward the truth or falsity* of the statement alleged to be defamatory. *Id.* at 119, 18 O.O. 3d at 356, 413 N.E. 2d at 1190-1191; *Graw v. Kleinschmidt* (1987), 31 Ohio St. 3d 84, 89, 31 OBR 250, 254, 509 N.E. 2d 399, 403. A defendant who was motivated to publish by the blackest spirit of hatred and spite will not be liable if he subjectively believed in the truth of the statement. See Smolla, Law of Defamation (1986) 3-38, Section 3.15.

Actual malice in defamation cases may be demonstrated only by evidence that the defendant published the statement at issue "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan, supra,* at 279-280. Such reckless disregard may be established by clear and convincing evidence that the defendant proceeded to publication despite a "high degree of awareness of *** probable falsity," *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, or that "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson* (1968), 390 U.S. 727, 731. The United States Supreme Court has emphasized that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant, supra,* at 731. The plaintiff must prove the defendant's actual knowledge or reckless disregard for the truth *with convincing clarity* in order to warrant submission of the cause to the jury. *Gray, supra,* at 89, 31 OBR at 254, 509 N.E. 2d at 403. Finally, actual malice is to be measured as of the time of publication. *Dupler, supra,* at 124, 18 O.O. 3d at 359, 413 N.E. 2d at 1193.

We hold, therefore, that the concept of actual malice in defamation cases involving public officials is separate and distinct from the traditionally defined common-law standard of malice or actual malice. Actual malice in the context of defamation may not be inferred from evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motives for publishing are irrelevant.

A defamation plaintiff who is required to show actual malice must demonstrate, with convincing clarity, that the defendant published the defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity.

In reviewing the instant cause, this court is mindful of its responsibility to conduct an independent examination of the record to ensure against forbidden intrusions into constitutionally protected expression. *Bose Corp. v. Consumers Union of U.S., Inc.* (1984), 466 U.S. 485, 508, rehearing denied (1984), 467 U.S. 1267. We are also aware of the fact that the judgment before us is the trial court's granting of appellant's motion for summary judgment. This court has observed that "[s]ummary procedures are especially appropriate in the First Amendment area" due to the potential chilling effect which the threat of a lawsuit may have on the exercise of First Amendment rights. *Dupler, supra*, at 120, 18 O.O. 3d at 357, 413 N.E. 2d at 1191. It is for this reason that the plaintiff's burden of establishing actual malice must be sustained with convincing clarity even when the plaintiff's case is being tested by a defendant's motion for summary judgment. *Dupler, supra*, at paragraphs one and two of the syllabus; *Bukky, supra*, at syllabus. The United States Supreme Court has recently held that "a court ruling on a motion for summary judgment must be guided by the New York Times 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. _____, _____, 91 L. Ed. 2d 202, 217. It should be remembered, however, that for purposes of

ruling on a defendant's summary judgment motion in this context, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at _____, 91 L. Ed. 2d at 216.

With all these principles in mind, we turn now to a consideration of whether appellee sustained her burden of demonstrating actual malice with convincing clarity. Our determination of this question mandates an independent review of the record and, particularly, the evidence adduced by appellee in opposition to appellant's motion for summary judgment.

In her brief in opposition to appellant's motion, appellee attached seven exhibits. The first exhibit is a copy of the allegedly defamatory ad. This item of evidence was no doubt offered to show the contents of the ad, and not to show actual malice, since no contention is made, and none could be made, that the allegations in the ad are "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant, supra,* at 732.

The second exhibit consists of certain answers to interrogatories propounded to appellee by another defendant, Tony Gall, who is not involved in this appeal. Appellee's answers alleged that the ad in question was prepared by the opposition political party for its candidate, Gall, who, appellee alleges, approved the ad for publication without checking its accuracy in any way. Clearly, these allegations are not probative of appellant's state of mind.

The third exhibit presents excerpts from appellee's deposition. The thrust of her testimony is basically threefold. Appellee first alleges that the footnotes in the ad citing appellant as a source for the allegations gave

appellant serious reason to doubt their veracity, since appellant's own articles were actually unsupportive of these charges. This contention is utterly without merit. The United States Supreme Court has held that the mere presence of conflicting stories in a defendant's own files does not establish that the defendant knew that the ad was false, "since the state of mind required for actual malice would have to be brought home to the persons in *** [the defendant's] organization having responsibility for the publication of the advertisement." *New York Times Co. v. Sullivan, supra,* at 287. Appellee next alleges that appellant could easily have checked the accuracy of the ad by reference to documents either in its possesion or readily accessible to appellant. This contention must also fail. "Failure to investigate does not in itself establish bad faith." *St. Amant, supra,* at 733, citing *New York Times Co. v. Sullivan, supra,* at 287-288. The third basis offered by appellee to support her claim of actual malice is her testimony concerning the presence of a reporter, employed by appellant, at certain public meetings attended by appellee. Appellee alleges that this reporter would have known from appellee's remarks at these meetings that appellee never advocated the positions attributed to her in the ad, such as the elimination of veterans' services. This argument is baseless. The fact that appellee never advocated these positions in meetings at which appellant's reporter was present does not even remotely establish that appellant realized the falsity or probable falsity of the allegation that appellee had at one time or another advocated that position.

At best, these arguments establish only that appellant "should have known" of the alleged falsity of the ad. As noted above, however, mere negligence is constitutionally insufficient to show actual malice. *St. Amant, supra, at 731; Dupler, supra,* at 119, 18 O.O. 3d at 356, 413 N.E. 2d at 1191.

The fourth exhibit offered by appellee consists of portions of a deposition taken of Herbert Thompson, who was appellant's general manager at the time the ad in question was published. These excerpts contain statements by Thompson that he did not investigate the accuracy of the ad, did not research the footnotes, and did not discuss the ad with the person responsible for advertising. Again, these statements may or may not raise an issue of negligence, but certainly do not establish knowledge of falsity or suspicion of probable falsity.

The fifth exhibit, upon which appellee relies most heavily, contains excerpts from the deposition of Robert Curran, appellant's editor at the time the ad was published. Appellee particularly emphasizes Curran's testimony that he saw the ad several days before it was published and remarked to Thompson, the general manager, that the ad was "bullshit." Appellee insists that his statement demonstrates knowledge of falsity or a high degree of awareness of probable falsity." Our review of the context of Curran's remarks[2] compels us to disagree. Curran explained that his statement that the ad was "bullshit" was an expression of his concern that if the ad were false, appellant would be included in any subsequent lawsuit. He stated that his concern was appellant's potential exposure to suit in the event that the ad's charges proved to be untrue. Curran never stated that he knew the charges were false, or that he

[2] The relevant portion of Curran's deposition is found in Appendix II, *infra,* at 88-90 [A18-22].

entertained any doubt whatsoever as to their probable falsity. He merely expressed concern that the charges *might* be false, and if they were, then appellant might be sued. The fact that Curran may have entertained doubts as to the *possible* falsity of the ad is immaterial. For liability to attach, a defendant must proceed to publication despite a "high degree of awareness of *** [the] *probable* falsity" of the published statements. (Emphasis added.) *Garrison v. Louisiana, supra,* at 74. Given Curran's explanation that his remark was not an expression of knowledge of falsity or serious doubts as to probable falsity, his statement cannot be considered probative of actual malice, and certainly cannot be deemed to have established actual malice" with convincing clarity."

The sixth exhibit contains appellee's answers to interrogatories propounded by appellant, in which appellee claims that appellant acted with actual malice in publishing the ad. In response to a request for the names of individuals who acted with actual malice, appellee lists only Herbert Thompson, appellant's general manager. In support of this claim, appellee inaccurately alleges that Thompson proceeded to publication despite Curran's warning that the ad was "libelous." The record before us, however, demonstrates that Curran only told Thompson that the ad might subject the paper to a libel suit. Such a statement does *not* establish Thompson's own subjective belief in the falsity or probable falsity of the ad.[3] Whether or not Thompson's acts were reasonable is not a relevant consideration, as mere negligence is insufficient to establish liability.

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[3] See *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. _____, 91 L. Ed. 2d 202, where the editor of the defendant magazine had told the defendant's president and chief executive officer before publication that the articles in question therein were "terrible" and "ridiculous." *Id.* at _____, 91 L. Ed. 2d at 210.

The seventh and final exhibit was a copy of R.C. 3599.091, relating to political campaign guidelines. This exhibit can have no relevance to appellant's state of mind, nor was it intended to be evidence of such.

Our independent review of the evidence compels us to conclude that appellee has failed to adduce evidence sufficient to establish actual malice with convincing clarity. The thrust of appellee's argument is that appellant had ready access to information that should have triggered suspicion regarding the truthfulness of the ad or that should have prompted an investigation of its accuracy. These allegations, if true, might raise an issue of negligence, but they do not demonstrate actual malice.

We consider it appropriate at this juncture to address the more specific question of the liability of a media defendant for its failure to check the accuracy of a paid political advertisement before proceeding to publication thereof. Appellee has alleged that appellant had a duty to investigate the charges made in the ad, particularly given the fact that the ad referred to appellant as a source for several of those charges.

In resolving this issue against appellee, we emphasize that acceptance of appellee's argument would necessarily impose restrictions on constitutionally guaranteed freedoms of expression, a position which we must be extremely reluctant to take. The very notion of a court interfering with the free flow of debate on matters of profound public concern is repugnant to our democratic way of life. We should never forget that an unfettered press is the custodian of all our liberties and the guarantor of our progress as a free society. "The First Amendment presupposes that the freedom to speak

one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp., supra*, at 503-504. The United States Supreme Court has remained uncompromising in its position on defamation, due to a concern that " '[w]hatever is added to the field of libel is taken from the field of free debate.' " *New York Times Co. v. Sullivan, supra*, at 272, quoting *Sweeney v. Patterson* (C.A.D.C. 1942), 128 F. 2d 457, 458. Preservation of free expression is of particular urgency in the political arena, since it is almost universally agreed that a major purpose of the First Amendment is to ensure vigorous, uninhibited discussion of governmental affairs. *Buckley v. Valeo* (1976), 424 U.S. 1, 14. This is an important reason why the United States Supreme Court has bestowed such formidable protections on a defendant in a defamation action brought by a public official, even for statements proven to be erroneous. See *New York Times Co. v. Sullivan, supra*, at 271-272. As one way of achieving this protection, the court has expressly rejected a negligence standard for media defendants. *St. Amant, supra*, at 731. Thus, a mere failure to investigate the accuracy of a news story cannot, by itself, establish liability. *Id.* at 733.

We are persuaded that these protections apply with special force to paid political advertisements. Such ads, unlike many news stories, are not generated from within the media organization itself—a fact which, practically speaking, should diminish media respnsibility for the accuracy of any statements contained in such ads. It should be noted that the political advertisement in *New York Times Coj. v. Sullivan, supra*, was checked by *no one* at the defendant newspaper, and still the court refused to impose liability. *Id.* at 287-288. The defendant's advertising manager therein relied on the reputation of the sponsors of the ad. *Id.* at 287. The

court considered this factor to be probative of an absence of actual malice. *Id.* Even where such reliance is negligent, liability will not lie. *St. Amant, supra,* at 730-733. However, where the contents of the proposed publication "are so inherently improbable that only a reckless man would have put them in circulation," the defendant may be guilty of actual malice. *St. Amant, supra,* at 732.

Accordingly, we hold that in defamation cases, a newspaper's liablity for failure to check the accuracy of advertisements, including political advertisements, is limited to those cases where the defendant actually knew the ad was false before publication, or where the ad is so inherently improbable on its fact that the defendant must have realized the ad was probably false. Thus, it may be seen that the mere failure to verify the truth of a statement is insufficient to raise an issue with respect to actual malice unless the statement is facially incredible or the defendant had subjective reason to doubt the source's reliabilty. *Id.* Our review of the contents of the ad in this case reveals nothing "so inherently improbable that only a reckless man would have put *** [it] in circulation." *Id.* The record contains no evidence that appellant had any subjective reason to doubt the reliability of the sources of the ad.[4]

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[4] In support of its motion for summary judgment, appellant presented the affidavit of Susan O. Waddell, who was advertising representative for the Geauga Times Leader when the ad in question was submitted for publication. She stated that "those who presented the advertisement for publication had good reputations in the community, and I relied upon the reputations of those individuals and the representations they made that the ad was accurate when I made my decision to approve it for publication." She further stated that she "did not believe anything in the advertisement was false, and had no reason to disbelieve anything that was set forth in the advertisement."

In sum, we have found no evidence from which a reasonable jury could find actual malice with convincing clarity. Therefore, the judgment of the court of appeals is reversed insofar as it pertains to appellant, and the judgment of the trial court is reinstated.

Judgment reversed.

MOYER, *C.J.*, SWEENEY, LOCHER, WRIGHT and H. BROWN, *JJ.*, concur.

HOLMES, *J.*, dissents.

HOLMES, *J.*, dissenting. In properly applying all the law relative to when a trial court may overrule a motion for summary judgment filed in a libel action brought by a public official against a news media agency, I would affirm the court of appeals in this matter. In *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. _____, _____, 91 L. Ed. 2d 202, 217, the Supreme Court of the United States held that while a libel plaintiff must prove some affirmative evidence of actual malice, the plaintiff, "to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Anderson does not change Ohio Rule of Civil Procedure 56, which provides in effect that summary judgment may be granted only when the following three criteria are present:

(1) There exists no genuine issue as to any facts, and

(2) the moving party is entitled to judgment as a matter of law, and

(3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made, who is entitled to have the evidence construed most strongly in his favor.

The court of appeals premised its findings upon a review of the record submitted, which included depositions and affidavits in connection with the motion for summary judgment. Some of this is set forth in Robert Curran's deposition at Appendix II of this opinion. Upon such record, the surrounding facts showed that the ads were published during a "hotly contested, bitter election in which strong personalities were involved" and that "[i]t is further obvious that the newspaper staff was personally acquainted with many of the principals and was aware of many of the issues and facts from their 'news gathering' activities."

The court of appeals found that "considering the evidence in the light most favorable to Varanese, a jury could reasonably infer that Curran's testimony raised serious doubt as to the truthfulness of the ad. *** Thus, the record contains evidence from which a jury could determine with convincing clarity that Lake-Geauga Printing Co. published the advertisement with actual malice, that is, with a high degree of awareness of its probable falsity."

It is my conclusion that the court of appeals properly applied the Ohio Civil Rules regarding summary judgment in accord with the standards set forth in the federal cases of *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, and *Anderson v. Liberty Lobby, Inc., supra*, and within the requirements of Civ. R. 56. The plaintiff presented sufficient evidence to survive summary judgment under these requirements. Therefore, the grant of summary judgment by the trial court was appropriately reversed by the court of appeals.

We Ask You To Judge For Yourself
Why Informed Taxpayers Are So UPSET With
BARBARA VARANESE
IS IT BECAUSE SHE DOESN'T "TELL IT LIKE IT IS"?

Geauga County faces a **critical funding situation** next year. Your Commissioners will have to use good judgement in resolving major problems.

Varanese is **NOT** the person to run a strong and responsible government. She is noted for creating chaos and conflict—even within her own party. She has a long history of confrontation—and everybody pays for it!!! (1) Her extended legal battles have cost all taxpayers **TENS OF THOUSANDS OF DOLLARS** over the years. (2) Much of her vindictive tirades have been directed toward fellow Democrat, Jim Mueller. She has labeled other office holders as "ignorant, incompetent, malicious, punitive, whining, law-breaking, and irresponsible."(1)

Look at her record as county treasurer for 1981. She consistently misled all of us with her "yellow political journalism".

***JUNE 1981** —County Treasurer Varanese lays off entire staff for month after constantly complaining about budget being cut too much. She neglected to tell voters she gave her staff **three** raises that year.(3)

***JUNE 1981** — Varanese requested the State Commissioner of Taxation to extend tax collection because she had no help to process the tax receipts. Then, she provided him a list of agencies and offices **she** considered expendable in order to finance **HER** office. (4)

That list consisted of:

- ***ELIMINATE** your Soldier's Relief and Veterans' Services (provides needed emergency relief for all veterans in the county.) (4)
- ***ELIMINATE** your Soil Conservation Service (vital for future generations.) (4)
- ***ELIMINATE** your County Extension Service (no more 4-H programs.) (4)
- ***ELIMINATE** salaries for Division of Aging Director, County Administrator, Restitution staff personnel, and County Planning Commission staff.' (4)

Varanese also included as **UNNECESSARY** the **REPAYMENT OF PRINCIPAL** on a note owed by the county and ~~money set aside~~ for capital improvements. Thousands of Geauga residents would be affected by this type of irresponsible action and attitude. Proud Geauga County residents would suffer immeasurable damage if she had her way.

*JULY 1981 — $11,000,000 of UNOPENED TAX RECEIPTS remained in her vault, idle, when they could have been earning thousands of dollars interest per day for our county. (5) (6).

*A county bank offered to provide professional help (a legal alternative) to assist in depositing some 15,000 taxpayers' checks. **Veranese refused their help.** A **Two-Day** job took **ONE MONTH!** (5)

*With all this stalling, Veranese also held in her vault nearly $250,000.00 worth of undeposited interest checks for almost **two months.** Monies that should have gone into the county general fund account to pay bills. County offices—including her own—suffered severe cash flow problems because spendable income lay unused in the treasurers vault. Creditors threatened to take Geauga County to court for payment of bills. (5)

*It took a threat by the Commissioners to have the State do a cash count audit to finally motivate Veranese to deposit some $250,000.00 into interest-bearing accounts—Typical Veranese confrontation again! (5) (6) (7)

*In 1977, **at Veranese's insistence,** former Prosecutor John Norton rendered an opinion that denied the collection of a .2 mil levy approved by 61% of Geauga voters. (8)

ONE PERSON SHOULD NOT be allowed to overrule 61% of the voters. Be careful how you vote on November 2nd. Don't be fooled with halftruths. We need responsible management of your county's resources.

On November 2nd
VOTE FOR
TONY GALL
FOR GEAUGA COUNTY COMMISSIONER

Paid for by Committee to Elect Tony Gall, Carl Manfredi, Chairman 11260 Kinsman Road, Newbury, Ohio

"Q. Mr. Curran, would you take a look at Plaintiff's Exhibit Number 1 [the ad], please?

"Mr. Curran, when did you first, when was the first time that you saw this ad?

"A. It would have been either the Thursday or Friday after and prior to its publication.

"Q. All right. And where did you see the ad at that time?

"A. I saw it on the counter in the advertising section of the Geauga Times Leader office.

"Q. At the time you first saw this ad at that location, who else was looking at the ad?

"A. Mr. Herb Thompson.

"Q. All right. Is that the same Mr. Thompson we talked about earlier, general manager?

"A. He was the general manager.

"Q. Okay. And did you look at the ad while Mr. Thompson was also looking at the ad?

"A. Yes, I did.

"Q. And did you peruse it?

"A. Yes, I did.

"Q. And while the ad was laying [*sic*] there, did you say anything to Mr. Thompson concerning that ad?

"A. Yes, I did.

"Q. And tell these folks what you told Mr. Thompson.

"A. I said it was bullshit.

"Q. And why did you say that?

"A. I said it because it appeared to be, and was, a listing of specific apparent charges from one candidate to another, and using as reference points, these numbers which appeared, which reference to footnotes, and which included in them were the Geauga Times Leader. The Geauga Times Leader was our newspaper, and I said, 'It is bullshit. We can't use this.'

"Q. Why could you not use that, in your judgment?

"A. In my judgment, to have specific charges of possible wrongdoing referring to our newspaper by name as the source of this information would be a problem to us if these charges were not accurate. It would be a problem to us, anyway, because it would appear that we were supporting one candidate in an advertisement prepared by another. It would appear we were giving it our imprimatur, for one. But, secondly, that we were justifying these charges and the—how can I word it.

"Q. All right. Go ahead, sir.

"A. When you see something that says, '$11,000,000 of unopened tax recepts lay in her vault; idle,' she is the treasurer of the county. Her job is to deal with money, that is her elected position. To say that we said that she misused the money, what if she didn't?

"I said—the term was, 'It is bullshit.' Followed by, 'If these aren't right, at all, in any way, and we get sued, if there is a libel, we can be included because our name is included.'

"Q. In the footnotes?

"A. In the footnotes.

"Q. All right. And did you tell that to Mr. Thompson at that time?

"A. Yes, I did.

"Q. And what did Mr. Thompson tell you in response to your remarks concerning the ad and the footnotes?

"Mr. Speros: Objection.

"Q. Go ahead sir. You can answer.

"A. Oh, I can?

"Q. Yes.

"A. He said, 'Don't worry about it. I will take care of it.'

"Q. All right. Did the ad and the footnotes cause you any other concerns or any other problems that you have not spoken to?

"A. I think you understand the concerns. If an ad or any statement in a newspaper of this nature, if it is proven—if it is wrong, if it is a false accusation, and we have substantiated it by putting our name to it; one, obviously, we could damage the reputation, but quite frankly—

"Q. Of who [*sic*]?

"A. The person who was being attacked.

"Q. In this case it was who?

"A. Mrs. Varanese. My thing was, as the editor, as a corporate officer, we can't even get attached in any way to this kind of thing.

"If they want to make the charge, don't make us the spokesperson for the charge, because that ties us to the charge as if we are making it ourselves. There is the appearance that we are supporting the charge.

"Q. All right. And did you tell that to Mr. Herb Thompson?

"A. Yes. I said, 'You know, if these things aren't right and we say they are right because we have our name on here—' even if we were ever to win a libel, let's say if they did sue for libel, we would be included. We are automatically included, obviously, because I would assume that everybody would be named as supporting these charges.

"We don't want to get our name linked to anything that could possibly be wrong. We are talking here about a person who is a treasurer, being accused of not doing her job, possibly holding up money that she would not have the right to hold up, and I had no independent knowledge of it. I had no independent knowledge she had ever been convicted of any of these things or, you know,

I don't—of course, I had only been at the paper for a period, but, again, I had no independent knowledge, and I said, 'Herb, what do we know about this?

"Q. Now, insofar as your concern about this ad and the footnotes to it, you indicated to us that you were concerned that if they were not true, that you could damage the reputation of Barbara Varanese? You have spoken to that point; am I right right [*sic*], sir?

"A. Yes.

"Q. And the second point was that the statements, did you consider them to be libelous or potentially libelous statements?

"Mr. Speros: Objection.

"Mr. LaFond: Objection.

"Q. Go ahead.

"A. I considered that it was the risk that if they were not totally and absolutely accurate, that then they could be considered libel by some competent authority.

"Mr. Speros: Objection. Move to strike.

"Q. All right. And is that the last conversation you had with Mr. Herb Thompson that day concerning this ad?

"A. He took two or three minutes, and that was it. He said, 'It is none of my concern.' And basically brushed me off, and I turned and went away.

"Q. All right. You continued to work for the Geauga Times Leader after this, sir; is that correct?

"A. Yes.

"Q. And then eventually you left the Geauga Times Leader?

"A. Yes, eventually.

"Q. And when approximately was that, sir?

"A. May 13th, 1983.

"Q. Mr. Curran, in reference to the statement that appears in the body of the ad, the statement that says, 'Varanese also held in her vault nearly $250,000 worth of undeposited interest checks for almost two months.' Did that statement also give you the same concerns you indicated to us here?

"Mr. Speros: Objection.

"Q. Go ahead. You can answer it with an objection. Go ahead.

"A. All right. There were three particular things that hit my eye, the $11,000,000.

"Q. Yes?

"A. With the notation, 5, 6, notating to footnote 5, which was one of ours, Geauga Times Leader.

"The $250,000, somebody holding money in their vault for that kind of period of time. I would assume that would be—for a treasurer, that that would be malfeasance, misfeasance or some kind of nonfeasance of what they are supposed to do with money coming in, and in neither of these cases, I had never seen any stories that she had been convicted or found guilty or whatever the right term would be.

"And the other one—I don't know why this would strike me—would be this one about that, 'At Varanese's insistence, former prosecutor, John Norton denied the—' et cetera, et cetera, et cetera.

"The prosecutor has got his job, Varanese has got her job. I read that as an implication, correctly or wrong, that they are saying that she coerced him.

"Q. Okay.

"A. And Norton, I mean, he can do his own deciding."

OPINION OF THE COURT OF APPEALS, GEAUGA COUNTY, OHIO

(Filed February 18, 1987)

Case Nos. 1233, 1240, 1241

COURT OF APPEALS
ELEVENTH DISTRICT
GEAUGA COUNTY

BARBARA VARANESE,
Plaintiff-Appellant,

vs.

TONY GALL, and LAKE-GEAUGA PRINTING CO., *et al.*,
Defendant-Appellees.

OPINION

Character of Proceedings: Civil Appeal from the Geauga County

Court of Common Pleas
Case No. 83 M 822

Judgment: *Affirmed in Part, Reversed in Part*

MAHONEY, *J.*,

Appellant, Barbara Varanese, Geauga County Treasurer, challenges an order of the Geauga County Common Pleas Court granting summary judgment in favor of appellees, Lake-Geauga Printing Company, Suburban Communications, Inc., and Thomas V. Martin, d.b.a. The Chesterland News, in her libel action against them. We affirm in part and reverse in part.

FACTS:

On October 21, 1983, Varanese filed a complaint in Geauga County Common Pleas Court. In her complaint, Varanese alleged that Lake-Geauga Printing, Suburban Communications, and Chesterland News had published and/or distributed a preprinted political advertisement concerning her activities as the Geauga County Treasurer with knowledge that statements in the advertisement were false or with reckless disregard as to their falsity. Varanese further alleged in her complaint that publication and/or distribution of the advertisement damaged her reputation and caused her pain and mental anguish.

Lake-Geauga Printing, Suburban Communications, and Chesterland News each filed separate motions for summary judgment. In their motions, each alleged that Varanese, a public official, had failed to present evidence from which a reasonable jury could find actual malice with convincing clarity. Varanese, in her opposition to the motions, argued that genuine issues of material fact remained as to whether those at Lake-Geauga Printing, Suburban Communications, and Chesterland News, responsible for publishing and/or distributing the advertisement, entertained serious doubts as to the truthfulness of the statements contained in the advertisement.

On April 1, 1985, the trial court, in a single opinion, granted each motion for summary judgment. In so ruling, the trial court determined that no reasonable jury, on the basis of the evidence presented, could find that Varanese had proven actual malice with convincing clarity.

ASSIGNMENTS OF ERROR:

I. The trial court erred to the prejudice of plaintiff-appellant in granting the motion of summary judgment of defendant-appellee, Thomas V. Martin dba Chesterland News.

II. The trial court erred to the prejudice of plaintiff-appellant in granting the motion for summary judgment of the defendant-appellee, Suburban Communications, Inc.

III. The trial court erred to the prejudice of plaintiff-appellant in granting the motion for summary judgment of the defendant-appellee, Lake Geauga Printing Company.

In her three assignments of error, Varanese contends that the trial court erred in granting summary judgment as she had presented evidence from which a jury could determine that Lake-Geauga Printing, Suburban Communications, and Chesterland News had published and/or distributed the political advertisement with actual malice.

The Ohio Supreme Court in *Duper v. Mansfield Journal Co.* (1980), 64 Ohio St. 116, determined that, in ruling on a defendant's motion for summary judgment in a libel action brought by a public official, a court must consider the evidence and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff to determine whether a reasonable jury could find actual malice with convincing clarity. A court must enter judgment for the defendant if it finds that there is no genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity. *Id.* at 120-121. See also, *Anderson v. Liberty Lobby, Inc.* (1986), 91 L. Ed. 2d 202; *Bukky v. Painesville Telegraph & Lake Geauga Printing Co.* (1981), 68 Ohio St. 2d 45.

The United States Supreme Court, in *New York Times v. Sullivan* (1964), 376 U.S. 254 defined "actual malice" as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. Actual malice may not be inferred from evidence of ill-will, personal spite or intention to injure on the part of the writer. *Rosenblatt v. Baer* (1966), 383 U.S. 75, 84; *Scott v. News Herald* (1986), 25 Ohio St. 2d at 119. Actual malice may not, furthermore, be established with evidence of negligence in failing to investigate the facts. *New York Times,* 376 U.S. at 271-272. Rather, in order to demonstrate actual malice, the plaintiff must present evidence that the statements were made with a "high degree of awareness of their probable falsity," *Garrison v. Louisiana* (1964), 379 U.S. 64, 74; *Dupler,* 64 Ohio St. 2d at 119; or that "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson* (1968), 390 U.S. 727, 731.

In *Hutchinson v. Proxmire* (1979), 443 U.S. 111, the United States Supreme Court expressed some doubt as to the propriety of rendering summary judgment in libel cases where the editor or reporter's state of mind or "subjective awareness of probable falsity" is the focal point of the case. Considering the nuances involved, proof of "actual malice" which calls a defendant's state of mind into question, does not readily lend itself to summary disposition. *Id.* at 120, fn. 9. In *Calder v. Jones* (1984), 465 U.S. 783, 790-791, the court reiterated its reluctance to grant special procedural protections to defendants in libel actions in addition to the constitutional protections already embodied in substantive law. See also *Anderson v. Liberty Lobby, Inc.* (1986), 91 L.Ed. 2d 202.

The record indicates that Lake-Geauga Printing published a newspaper known as the Geauga Times Leader, which, in turn, published an advertising leaflet called the Maple Leaf Shopper. The record further indicates that Susan O. Waddell was the Leader's advertising representative; Robert Curran, its editor; and Herbert Thompson, its general manager. In his deposition, Curran stated that he first read the ad in question on the Thursday or Friday before it was published in the Leader on October 25, 1982.[1] Curran further stated that, upon reading the ad, he told Thompson it was "bullshit," and asked Thompson, "[W]hat do we know about this?" and "Do you know this is true?" Curran stated that Thompson then told him that he [Thompson] would handle it and that it was none of his [Curran's] business. In his answers to interrogatories, Thompson stated that Waddell was the only employee at the Leader who reviewed the ad prior to its publication and, further, that no employees had reservations as to the subject matter of the advertisement. Waddell, in her affidavit, stated that she alone decided to publish the ad, and, in so deciding, relied upon the reputation of those who presented the ad for publication and their representations that the statements in the ad were accurate.

It is undisputed from the depositions and affidavits submitted in connection with the summary judgment that this was a hotly contested, bitter election in which strong personalities were involved. It is further obvious that the newspaper staff was personally acquainted with many of the principals and was aware of many of the issues and facts from their "news gathering" activities.

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[1] The ad appeared again in the Leader and the Maple Leaf Shopper on November 1, 1982.

Some of the charges against Varanese involve misconduct in office and could result in criminal actions against her, if true. At least two of the accusations point to the Times-Leader as their source and verification.

Justice White stated for the majority in *St. Amant v. Thompson*, 390 U.S. at 732:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive *** when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Here, considering the evidence in the light most favorable to Varanese, a jury could reasonably infer that Curran's testimony raised serious doubt as to the truthfulness of the ad. Likewise, in the same light, a jury could reasonably infer that the Times-Leader staff lacked good faith by sitting back, playing dumb, and claiming reliance on the integrity of the Geauga County Republican leaders who submitted the ad to them for publication. Thus, the record contains evidence from which a jury could determine with convincing clarity that Lake-Geauga Printing Co. published the advertisement with actual malice, that is, with a high degree of awareness of its probable falsity.

The record, however, does support the trial court's determination that Varanese produced no evidence from which a reasonable jury could determine with convincing clarity that either Suburban Communications or Chesterland News published and/or distributed the advertisement with actual malice.

With respect to Chesterland News, its owner, Thomas Martin, stated in his deposition, that he reviewed the preprinted political insert prior to its distribution in the Chesterland News on October 27, 1982. He stated that he reviewed the insert and determined that it contained no obscenities, alleged no criminal acts, related only to Varanese's political activities, and indicated that it was a paid political advertisement. He stated further that while he realized the ad was "caustic" and "nasty," he never suspected that the statements contained in the ad were false. Thus, the record contains no evidence from which a jury could find, with convincing clarity, that Chesterland News distributed the advertisement with actual malice. The trial court, therefore, did not err in granting summary judgment in favor of Chesterland News.

With respect to Suburban Communications, its president, Thomas Henry, stated in his deposition, that Suburban Communications publishes a weekly shopping guide called the Good News. He stated further that he alone reviewed the ad and determined that it contained no obscenities and displayed the name and address of the persons responsible for placing the ad. He stated further that he assumed the ad was accurate in reliance upon the names and the reputations of those who presented the ad for distribution. As the record contains no evidence that Henry or Suburban Communications distributed the insert with a high degree of awareness of its probable falsity or while entertaining serious doubts as to the insert's truthfulness, the trial court did not err in granting summary judgment in favor of Suburban Communications.

Varanese's first and second assignments of error are not well taken. Varanese's third assignment is well taken. Thus, the trial court's grant of summary judgment in favor of Lake-Geauga Printing Co. is reversed, and the matter is remanded to the trial court for further proceedings in accordance with this opinion.

/s/ EDWARD J. MAHONEY
Judge for the Court

MAHONEY, *J.*, 9th District
COX, *J.*, 7th District
MALLONE, *J.*, Ret.
Assigned by the Supreme Court
to the Eleventh District

JUDGMENT ENTRY OF THE COURT OF APPEALS OF GEAUGA COUNTY, OHIO

(Filed February 18, 1987)

Case Nos. 1233, 1240, 1241

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

BARBARA VARANESE,
Plaintiff-Appellant,

vs.

TONY GALL, and LAKE-GEAUGA PRINTING CO. *Et Al.*,
Defendant-Appellees.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, appellant's first and second assignments of error are without merit, but her third assignment of error is well taken. Thus, the trial court's granting of summary judgment in favor of Lake-Geauga Printing Co. is reversed, and the matter is remanded to the trial court for further proceedings in accordance with this opinion.

/s/ EDWARD J. MAHONEY
Judge for the Court

MAHONEY, *J.*, 9th District
COX, *J.*, 7th District
MALLONE, *J.*, Ret.
Assigned by the Supreme Court
to the Eleventh District

OPINION OF THE COURT OF COMMON PLEAS

(Dated March 29, 1985)

Case No. 83-M-822

IN THE COURT OF COMMON PLEAS

BARBARA VARANESE,
Plaintiff,

vs.

TONY CALL, *et al.*,
Defendant.

OPINION

RALPH A. MCALLISTER, *J.*:

This matter came on for consideration by the Court on the separate Motions for Summary Judgment filed by defendants Suburban Communications, Inc., Chesterland News, and Lake-Geauga Printing Company, and the briefs, affidavits, depositions, Answers to Interrogatories and exhibits submitted by plaintiff Barbara Varanese and the defendants.

Varanese filed a Complaint on October 21, 1983, alleging that various defendants, including the defendant newspapers named above, published and distributed certain written material, to-wit: a preprinted political advertisement concerning her activities as a public official, with knowledge that such material was false or with reckless disregard as to whether such material was

false. Varanese contends that the publication and distribution of the allegedly defamatory advertisement by the defendants caused damage to her good name and reputation and further caused her pain, physical injury, and mental anguish.

The defendant newspapers filed separate Motions for Summary Judgment on the ground that Varanese, as a public official, has failed to present evidence from which a reasonable jury could find actual malice with convincing clarity. Varanese argues in opposition that a material issue of fact exists as to whether those persons responsible for the publication and distribution of the subject advertisement in fact entertained serious doubts as to the truth of the advertisement which their respective newspapers distributed.

The Court finds that there is no genuine issue as to any material fact in this case and that each defendant newspaper is entitled to judgment as a matter of law. Civil Rule 56(C) provides that summary judgment shall not be rendered unless it appears from the evidence that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in her favor.

The Court is cognizant of its duty in ruling on motions for summary judgment in defamation actions. The Ohio Supreme Court set forth the following principle in *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 121 (1980):

> While summary judgment has been liberally utilized, at both federal and state levels, to dispose of libel actions having First Amendment implications, it must be remembered that "[p]rinciples applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action." *Hotchner v. Castillo-Puche* (S.D. N.Y. 1975), 404 F. Supp. 1041, 1050. Thus, a trial court may not weigh the proof or choose among reasonable inferences. In ruling on such a motion, the court is limited to examining the evidence "taking all permissible inferences and resolving questions of credibility in plaintiff's favor to determine whether a reasonable jury acting reasonably could find actual malice with convincing clarity." *Nader v. deToledano* (D.C. App. 1979), 408 A. 2d 31, 50. (Footnote omitted.)

The Court will apply the foregoing principle to the evidence presented by the parties.

Varanese, as Geauga County Treasurer and a candidate for the office of Geauga County Commissioner, is clearly a public official; as such, the libelous nature of the subject political advertisement must be judged by the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Dupler, supra.* The burden of proof is on the plaintiff Varanese, therefore, to prove by clear and convincing evidence that the individual defendant newspapers published or distributed the political advertisement with actual knowledge of the falsity of the statements contained therein, or with reckless disregard of whether the statements were false. *Sullivan, supra; Dupler, supra.* The Court will consider the motions of each defendant newspaper separately.

I. *SUBURBAN COMMUNICATIONS, INC.*

Suburban Communications, Inc. ("Suburban") is the publisher of a weekly advertising shopper known as "The Good News." Suburban submits that it had no input into the length, layout or language of the political advertisement. The advertisement, in the form of a pre-printed "flyer" or insert, was distributed by Suburban exactly as it was presented to the newspaper by Carl Manfredi, a defendant in this action and the Chairman of candidate Tony Gall's election committee. Thomas M. Henry, President of Suburban and the person at the newspaper responsible for the distribution of the advertisement, stated that he had no interest in the Varanese-Gall political race. Henry further stated that he did not entertain serious doubts regarding the accuracy of the statements contained in the advertisement.

Varanese argues that Suburban's complete failure to conduct a reliable investigation of the disputed factual statements contained in the advertisements in light of Henry's admitted knowledge of the events of the political race and his business dealing with Manfredi, suggests a reckless disregard by Suburban for the falsity of the published statement.

The Court finds that Suburban's failure to investigate the factual statements contained in the advertisement is insufficient to provide plaintiff with a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity. As the Ohio Supreme Court stated in *Dupler, supra*, at 119:

> Since reckless disregard is not measured by lack of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice.

The Court previously granted summary judgment to defendant Town & Country Publisher/Lithographers, Inc. ("Town & Country") on the same basis, finding that, at best, Town & Country's conduct amounted to mere negligence. (*See* Court's *Opinion*, dated January 8, 1985.) In granting summary judgment for Town & Country, the Court recognized the burden which would be imposed upon distributors such as Town & Country if they were required to investigate and verify statements made in political advertisements in the manner in which Varanese suggests. The Court also noted the substantial impact that such a requirement would have on the free flow of political information to the general public. The Court cannot find any justifiable reason to deviate from the rationale and conclusion set forth in its January 8, 1985, Opinion, as it relates to the arguments advanced by Suburban. An examination of the evidence presented indicates that a reasonable jury could not find actual malice by Suburban with convincing clarity.

With respect to defendant Suburban's Motion for Summary Judgment, the Court concludes that, construing the evidence most strongly in plaintiff Varanese's favor, reasonable minds can come to but one conclusion, and that conclusion is adverse to plaintiff Varanese. Judgment is granted to defendant Suburban Communications, Inc., as a matter of law. Counsel for Suburban will submit an appropriate Judgment Entry to the Court forthwith.

II. *CHESTERLAND NEWS*

Chesterland News, characterized by its owner and manager, Thomas Martin, as "one big public service newspaper," (*see* Martin deposition, p. 31, attached to Varanese's Brief in Opposition to Chesterland News' motion) distributed the subject political advertisement as

an insert in the October 27, 1982, edition of the newspaper. Martin, the person at Chesterland News responsible for the distribution of the advertisement, contended that his newspaper distributed the advertisement in exactly the form presented to it by defendant Carl Manfredi. Martin admitted that the accusations made in the advertisement were "very caustic, very nasty" (Martin deposition, p. 98), but also stated that he believed them to be true based upon what he had read in the past about Varanese.

Varanese submits that Martin's awareness of the caustic nature of the statements made in the advertisement should have signalled to him that a further investigation into the facts was necessary. At any rate, Varanese argues that because of his knowledge of the hotly-contested Varanese-Gall race, Martin may well have had doubts as to the veracity of these statements.

The Court has previously stated that a newspaper's negligent failure to investigate factual statements contained in a political advertisement is not proof of actual malice. *Dupler, supra.* Under the facts presented in the instant case, Chesterland News' failure to investigate the accusations made in the advertisement does not amount to a showing of actual malice with the convincing clarity required by law. *Dupler, supra.*

In her brief opposing the Motion for Summary Judgment, Varanese offered no evidence from which a reasonable jury could conclude that Martin entertained serious doubts as to the truth of the statements contained in the publication. Likewise, no reasonable jury acting reasonably could find with convincing clarity that Chesterland News was motivated by "actual malice" as defined in *New York Times Co. v. Sullivan, supra,* and *Dupler, supra.*

With respect to defendant Chesterland News' Motion for Summary Judgment, the Court concludes that, construing the evidence most strongly in plaintiff Varanese's favor, reasonable minds can come to but one conclusion, and that conclusion is adverse to plaintiff Varanese. Judgment is granted to defendant Chesterland News as a matter of law. Counsel for Chesterland News will submit an appropriate Judgment Entry to the Court forthwith.

III. *LAKE-GEAUGA PRINTING COMPANY*

The Geauga Times Leader, the only daily newspaper in Geauga County at the time the political advertisement was distributed, and the Maple Leaf Shopper, a shopping guide published by the Geauga Times Leader, are publications of defendant Lake-Geauga Printing Company ("Lake-Geauga"). The Times Leader received a full-page advertisement from the Committee to Elect Tony Gall in mid-October, 1982. The Times Leader's sole handling of the advertisement was its physical typesetting of the advertisement in preparation for publication. Neither the Times Leader nor the Maple Leaf Shopper participated in the writing or editing of the advertisement. Lake-Geauga contends that the decision to approve the advertisement for publication belonged to one Susan O. Waddell, then an advertising representative of the Times Leader. Waddell stated in her affidavit that nothing set forth in the advertisement caused her to believe that the advertisement was false, and that if she had any such concerns, she would have immediately consulted her superiors.

Varanese submits that final approval for publication of the advertisement was vested in one Herbert Thompson, the Times Leader's general manager. Plaintiff claims that because Thompson was cautioned by the then editor of the newspaper, Robert Curran, that the advertisement was libelous,[1] the failure of the newspaper to verify or corroborate the statements made in the advertisement presents a genuine issue of material fact as to whether the newspaper entertained serious doubts as to the truth of the statements.

The Court again finds that under the facts presented by the parties, Lake-Geauga's failure to investigate the allegations contained in the political advertisement does not amount to a showing of actual malice. The decision to publish the advertisement, whether it properly belonged to Thompson or Waddell, most certainly did not belong to Curran. Curran's concern about the truthfulness of the advertisement is irrelevant. Accepting Varanese's argument on this point as true—that Thompson, as the ultimate decision-maker, was cautioned by Curran as to possible liability—it still remains that Varanese has not produced the quantum of evidence necessary to withstand Lake-Geauga's motion for summary judgment. The newspaper could have investigated the statements made, but its failure to do so amounted to mere negligence, at best. ("... [I]nvestigatory failure alone . . ., without a high degree of awareness of falsity, may raise the issue of negligence but not the issue of 'actual malice'." *Tagaws v. Maui*

[1] In fact, Curran never stated that the statements contained in the advertisement were "libelous." Curran was concerned that the newspaper might be included in a libel action if the advertisement proved to be untrue. Curran also expressed concern that the footnotes contained in the advertisement cited the Times Leader as an authority for the statements made in the advertisement.

Publishing Co. (Hawaii 1968), 448 P. 2d 337, 340 (cited with approval in *Dupler, supra*, at 123.)) Evidence of negligence is insufficient to establish actual malice. *Dupler, supra.*

With respect to defendant Lake-Geauga's Motion for Summary Judgment, the Court concludes that, construing the evidence most strongly in plaintiff Varanese's favor, reasonable minds can come to but one conclusion, and that conclusion is adverse to plaintiff Varanese. Judgment is granted to defendant Lake-Geauga as a matter of law. Counsel for Lake-Geauga will submit an appropriate Judgment Entry to the Court forthwith.

IT IS SO ORDERED.

/s/ RALPH A. MCALLISTER
Judge
(Sitting by Assignment)

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

Case No. 83 M 882

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

BARBARA VARANESE,
Plaintiff,

vs.

TONY GALL, *et al.*,
Defendants.

JUDGMENT ENTRY

JUDGE RALPH MCALLISTER

UPON CONSIDERATION OF defendant Lake-Geauga Printing Company's motion for summary judgment:

IT APPEARING TO THE COURT that for reasons appearing in the Court's opinion of March 29, 1985, incorporated herein by reference, there is no genuine issue as to any material fact and that defendant Lake-Geauga is entitled to judgment in its favor as a matter of law; and

IT FURTHER APPEARING TO THE COURT that there remain in this action claims against numerous other parties regarding which trial will apparently be necessary, and that there is no just reason for delay of entry of final judgment in favor of the Lake-Geauga Printing Company;

IT IS HEREBY ORDERED that Lake-Geauga Printing Company's motion for summary judgment is granted, and final judgment is entered against plaintiff and in favor of defendant Lake-Geauga Printing Company.

/s/ RALPH A. MCALLISTER
Judge
(Sitting by Assignment)

APPROVED:

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JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated February 3, 1988)

Case No. 87-636

THE SUPREME COURT OF OHIO

COLUMBUS

BARBARA VARANESE,
Appellee,

vs.

GALL, *et al.;* LAKE-GEAUGA PRINTING CO., d/b/a GEAUGA TIMES LEADER, *et al.*,
Appellants.

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Geauga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed insofar as it pertains to appellant and the judgment of the trial court is reinstated consistent with the opinion rendered herein.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Geauga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Geauga County for entry.

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Dated February 3, 1988)

Case No. 87-636

THE SUPREME COURT OF OHIO

COLUMBUS

BARBARA VARANESE,
Appellee,

vs.

GALL, *et al.;* LAKE-GEAUGA PRINTING CO., d/b/a GEAUGA TIMES LEADER, *et al.,*
Appellants.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Geauga, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed insofar as it pertains to appellant and the judgment of the trial court is reinstated consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by James M. Speros.

/s/ THOMAS J. MOYER
Chief Justice

OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this

rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by

depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presnted in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended, eff 7-1-76)

We Ask You To Judge For Yourself
Why Informed Taxpayers Are So UPSET With
BARBARA VARANESE
IS IT BECAUSE SHE DOESN'T "TELL IT LIKE IT IS"?

Geauga County faces a **critical funding situation** next year. Your Commissioners will have to use good judgement in resolving major problems.

Varanese is **NOT** the person to run a strong and responsible government. She is noted for creating chaos and conflict—even within her own party. She has a long history of confrontation—and everybody pays for it!!! (1) Her extended legal battles have cost all taxpayers **TENS OF THOUSANDS OF DOLLARS** over the years. (2) Much of her vindictive tirades have been directed toward fellow Democrat, Jim Mueller. She has labeled other office holders as "ignorant, incompetent, malicious, punitive, whining, law-breaking, and irresponsible."(1)

Look at her record as county treasurer for 1981. She consistently misled all of us with her "yellow political journalism".

***JUNE 1981** —County Treasurer Varanese lays off entire staff for month after constantly complaining about budget being cut too much. She neglected to tell voters she gave her staff **three** raises that year.(3)

***JUNE 1981** — Varanese requested the State Commissioner of Taxation to extend tax collection because she had no help to process the tax receipts. Then, she provided him a list of agencies and offices **she** considered expendable in order to finance **HER** office. (4)

That list consisted of:

***ELIMINATE** your Soldier's Relief and Veterans' Services (provides needed emergency relief for all veterans in the county.) (4)

***ELIMINATE** your Soil Conservation Service (vital for future generations.) (4)

***ELIMINATE** your County Extension Service (no more 4-H programs.) (4)

***ELIMINATE** salaries for Division of Aging Director, County Administrator, Restitution staff personnel, and County Planning Commission staff. (4)

Varanese also included as **UNNECESSARY** the **REPAYMENT OF PRINCIPAL** on a note owed by the county and ~~money set aside~~ for capital improvements. Thousands of Geauga residents would be affected by this type of irresponsible action and attitude. Proud Geauga County residents would suffer immeasurable damage if she had her way.

***JULY 1981 — $11,000,000** of UNOPENED TAX RECEIPTS remained in her vault; **idle**, when they could have been earning thousands of dollars interest per day for our county. (5) (6).

*A county bank offered to provide professional help (a legal alternative) to assist in depositing some 15,000 taxpayers' checks. **Varanese refused their help. A Two-Day** job took **ONE MONTH!** (5)

*With all this stalling, Varanese also held in her vault nearly **$250,000.00** worth of undeposited interest checks for almost **two months.** Monies that should have gone into the county general fund account to pay bills. County offices—including her own—suffered severe cash flow problems because spendable income lay unused in the treasurers vault. Creditors threatened to take Geauga County to court for payment of bills. (5)

*It took a threat by the Commissioners to have the State do a cash count audit to finally motivate Varanese to deposit some $250,000.00 into interest-bearing accounts—Typical Varanese confrontation again! (5) (6) (7)

*In 1977, **at Varanese's insistence,** former Prosecutor John Norton rendered an opinion that denied the collection of a .2 mil levy approved by 61% of Geauga voters. (8)

ONE PERSON SHOULD NOT be allowed to overrule 61% of the voters. Be careful how you vote on November 2nd. Don't be fooled with halftruths. We need responsible management of your county's resources.

On November 2nd VOTE FOR
TONY GALL
FOR GEAUGA COUNTY COMMISSIONER

1. Newspaper articles, Varanese ads and letters, WERC Radio tapes. 2. Interest case in Supreme Court of Ohio. 3. County payroll records, 1981. 4. Document presented to State Commissioner of Taxation 6/12/81. 5. Newspaper reports - Geauga Times Leader, Plain Dealer, Cleveland Press. 6. Investment and deposit records, Chardon Savings Bank, Huntington Bank, BancOhio. 7. Telegram from Ferguson's Office, Telephone conversation between employee in State Auditor's Office and Commissioner's Office. 8. Opinion rendered April, 1977, Geauga Times Leader article November 5, 1981.

No. 87-1819

IN THE

Supreme Court of the United States

October Term, 1987

BARBARA VARANESE,
Petitioner,

vs.

TONY GALL, *et al.*; LAKE-GEAUGA PRINTING COMPANY, d.b.a. GEAUGA TIMES LEADER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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I.

COUNTERSTATEMENTS OF THE QUESTIONS PRESENTED

A. DID THE OHIO SUPREME COURT APPLY THE *ANDERSON v. LIBERTY LOBBY* STANDARD IN A MANNER THAT SUPPLANTED OHIO RULE OF CIVIL PROCEDURE 56, SO THAT THE SUMMARY JUDGMENT VEHICLE REPLACES A TRIAL?

B. DOES THE ACTUAL MALICE TEST AS APPLIED BY THE OHIO SUPREME COURT IN THIS MATTER, OPERATE AS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO A JURY TRIAL AND OF OPEN ACCESS TO THE COURTS?

II.

STATEMENT OF CORPORATE AFFILIATION

The Lake-Geauga Printing Company, at the time of this incident, was a privately held company with all of its stock owned by the Ashtabula Printing Company of Ashtabula, Ohio. The Ashtabula Printing Company was a privately owned corporation, whose stock was totally owned by the Rowley Family of Ashtabula County, Ohio.

Since the inception of this case, the Lake-Geauga Printing Company assets and the Ashtabula Printing Company assets were sold, and both companies were dissolved, together with the stock and said companies.

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OHIO SUPREME COURT RULES

Rule 1. Supreme Court Opinions

(A) All opinions of the Supreme Court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a per curiam opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each per curiam opinion and are those necessarily arising from the facts of the specific case before the Court of adjudication.

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STATEMENT OF THE CASE

Respondent must initially apologize for the rather lengthy dissertation of facts which follows. However, in light of numerous misstatements of petitioner—particularly as respects the testimony of witness Curran and his role in the case—a more accurate presentation is required.

In this libel lawsuit, a politician seeks to place a newspaper on trial because it published an advertisement placed by her political opponents. Petitioner is Barbara Varanese, who in 1982 was Geauga County Treasurer, and a candidate for County Commissioner. Her opponent was Township Trustee Tony Gall, whose campaign placed the advertisement at issue just before the November general election.

Mrs. Varanese had been a flamboyant public official, and had thrust herself deeply into a number of controversial public issues. Her record on those issues and her performance as county treasurer were the basic issues in the campaign and the subject of the advertisement.

In the fall of 1982, Susan Waddell was an advertising representative for the Geauga Times Leader, a daily newspaper published by defendant Lake-Geauga Printing Company. Herbert Thompson was the manager of the newspaper, responsible for its overall operations. Robert Curran was the newspaper's editor, with responsibilities and authority limited to the paper's news content. Curran had absolutely nothing to do with advertising (Record at 23, 40, 41; 51, 67-69).

Sometime in mid-October, 1982, Ms. Waddell received the text of the challenged advertisement from the Tony Gall campaign. As she processed the advertisement for publication (making preliminary type size and layout determinations according to instructions from Gall's campaign), Ms. Waddell considered the content of the text. She noticed it confined its comment to Mrs. Varanese's actions as a public official, and contained neither obscenity nor profanity. The ad thus met two of the newspaper's criteria for publication (Record at 1-3).

More importantly, however, Ms. Waddell saw nothing in the text which she believed or suspected to be false. She recalled reading news articles about many of the matters set forth in the text. There were details, of course, that she did not recall. But Ms. Waddell noted the Tony Gall campaign involved individuals with good reputations in the community and she relied upon their reputations when she decided to approve the advertisement for publication (*Ibid.*).

Herb Thompson, her supervisor, looked at the advertisement prior to its publication. He had no occasion to review the advertisement for the purpose of approving or rejecting it. He happened to notice the advertisement as Ms. Waddell was laying it out (Record at 21).

Thompson, a veteran of 28 years of political campaigns, saw nothing wrong with the advertisement and saw it as simply "political talk." In deposition he explained why:

> A. Well, I have been in the newspaper business for 28 years. I have been through political campaigns and races, national, local, whatever all right, and when it gets to political, one is as hotly contested as the other one. I don't care if it is the sanitation engineer or if it is the President of the United States.

(Record at 28).

Petitioner has not asserted that Thompson's statements evidence actual knowledge of falsehood or a high degree of awareness of its probable falsity; rather petitioner concludes that Curran's statements evidence these factors and should be imputed to Thompson (Petition for Writ of Certiorari at p. 12).

Petitioner also asserts that Curran concluded that the advertisement was libelous and that Curran had serious reservations or concerns about the truthfulness of the advertisement (Petition for Writ of Certiorari at p. 6).

Such is not the case. *Even Curran's testimony does not support petitioner's desired conclusion.* Instead, Curran testified at his depositions:

> Q. Did you believe the matters set forth in the advertisement were false?
>
> A. *I did not know if they were false. I did not know if they were true.*

(Record at 74) (Emphasis added).

Contrary to petitioner's assertions, Curran *never* concluded that the advertisement was libelous, *never* testified that he thought the advertisement was false and *nowhere* does he testify that he ever expressed serious reservations or concerns about the truth of the matter. As will be demonstrated in this brief, petitioner misstated, misinterpreted, and took Curran's statements out of context in order to reach the desired conclusion.

Curran's concerns *were not about truth, but of propriety.* The record presented no genuine dispute as to the following facts, as found by the trial judge:

> *In fact, Curran never stated that the statements contained in the advertisement were "libelous." Curran was concerned that the newspaper might be included in a libel action if the advertisement proved to be untrue.* Curran also expressed concern that the footnotes contained in the advertisement cited the Times Leader as an authority for the statements made in the advertisement.

(Emphasis added) (*See* Appendix to Petition for Writ at A39).

The Court of Appeals for Geauga County ignored Curran's own testimony as to what he meant by the use of the term "bullshit," and reversed the entry of summary judgment. In so doing, the appellate court found or created issues of fact where none existed, and ignored the standard of review in public official libel cases which has been set forth in numerous recent Ohio and United States Supreme Court decisions.

The Ohio Supreme Court corrected this misapplication and found that the statements of the respondents, including those of Curran, did not evidence actual malice with convincing clarity in that Curran's statements did not evidence actual knowledge that the advertisement was false nor did it demonstrate a high degree of awareness of its probable falsity.

Petitioner has now petitioned this Court to grant a Writ of Certiorari. As will be demonstrated the Petition presents no viable federal question or true conflict between the Ohio Supreme Court's decision in this matter and Ohio law or the decisions of the United States Supreme Court, but merely expresses the petitioner's dissatisfaction with the outcome of her case in the trial court and Ohio Supreme Court.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE OHIO SUPREME COURT IN THIS MATTER DOES NOT CONFLICT WITH DECISIONS OF OHIO'S COURTS OR THE SUPREME COURT OF THE UNITED STATES BUT MERELY RESTATES WELL ESTABLISHED "BLACK LETTER" LAW AS RESPECTS A PUBLIC OFFICIAL'S BURDEN IN A DEFAMATION ACTION.

This case very simply involves the application of a principle of law which has been well defined and specifically stated by both the Ohio Supreme Court and the United States Supreme Court. The respondent respectfully submits that nothing will be gained in terms of guidance to the federal courts or Ohio's courts as a result of the court reviewing this case involving yet another defamation action regarding a public official.

The degree of the burden placed upon a public official attempting to withstand a defendant's motion for summary judgment in a libel action has been specifically stated and is well established in Ohio law as follows:

> In order to withstand defendant's motion for summary judgment in a libel action brought by a public official, the plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.

(*Bukky v. Lake-Geauga Printing Co.* (1981), 68 Ohio St. 2d 45, *reaffirmed, see Grau v. Kleinschmidt* (1987), 31 Ohio St. 3d 84, 90).

The Ohio Supreme Court's holdings are consistent with the rulings of the United States Supreme Court, in that to defeat a defendant's motion for summary judgment in a defamation action a public official cannot

merely present facts which raise *some* issue of fact; rather a public official must present substantial facts of sufficient persuasive value that would:

> . . . allow a rational finder of fact to find *actual malice* by *clear and convincing evidence.*

Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. _____, 91 L. Ed. 2d 202, 215.

A. Actual Malice

Since *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, it has been hornbook law that the federal constitution bars recovery for defamation regarding a public official or a public issue unless the defamatory material was published with "actual malice" *i.e.,* with knowledge of falsity or with reckless disregard as to the truth of the matter.

The Ohio Supreme Court in this matter relied upon this black letter law and applied other United States Supreme Court decisions which further explained the standard or proof plaintiff must demonstrate as it stated:

> Such reckless disregard may be established by clear and convincing evidence that the defendant proceeded to publication despite a "*high degree of awareness of *** probable falsity*," *Garrison v. Louisiana* (1964), 379 U.S. 64, 74 or that "*the defendant in fact entertained serious doubts as to the truth of his publication.*" *St. Amant v. Thompson* (1968), 390 U.S. 727, 731. The United States Supreme Court has emphasized that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious* doubts

> as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant, supra* at 731 (Emphasis added).

(*See* Appendix to Petition for Writ at A5).

The standard to be applied in this action is clear. Petitioner in order to overcome defendant's motion for summary judgment is required to show actual malice on the part of the respondent in that petitioner must demonstrate with *convincing clarity* that the respondent published the statement with (1) *actual knowledge* that the statement was false, or (2) a *high* degree of awareness of its *probable* falsity.

Therefore the burden of the petitioner in this matter in order to overcome defendant's motion for summary judgment was succinctly and accurately stated by the Ohio Supreme Court in a manner that is consistent with both the previous decisions in Ohio's courts as well as the United States Supreme Court.

B. Application of the Defamation Standard

The standard for defamation cases involving public officials was correctly set forth by the Ohio Supreme Court in this matter and was properly applied based upon the facts of this case.

Petitioner in essence bases her entire case upon the statements of Robert Curran, an editor at the Geauga Times Leader. Petitioner does so even though the undisputed evidence indicates that Curran had no involvement whatever in the advertising approval process (Record at 23, 40-41, 51, 67-69). As *New York Times Co. v. Sullivan* made plain more than twenty years ago the proper focus regarding the knowledge of falsity

is upon the individuals actually "having responsibility for the publication of the advertisement." *New York Times, Co.*, 376 U.S. at 287.

The proper focus in this case is, thus, on whether Susan Waddell, the advertising representative responsible for the approval of the publication of the advertisement, knew or seriously suspected the advertisement, or the contents thereof, to be false at the time of publication. The record is undisputed that she had no such knowledge or suspicion. Further evidencing this fact, her affidavit to that effect (Record at 1-3) was unchallenged and petitioner did not even file her deposition for purposes of challenging any statements made in the affidavit. Petitioner also does not contend that Ms. Waddell had knowledge or suspicion of any falsity in the advertisement.

Therefore, the issue of knowledge or suspicion of falsity on the part of the *individual* responsible for the publication of the advertisement, Susan Waddell, has not been presently raised by the petitioner and is not at issue.

Petitioner attempts to misinterpret and take out of context Curran's statements in order to meet the burden of proof placed upon her in a public official defamation action. Contrary to the assertions made by the petitioner; Curran's testimony demonstrates that he neither *knew nor suspected* the advertisement to be false; he never told Herbert Thompson that the matters set forth in the advertisement were false; he did not talk with Waddell about the advertisement; and in no manner ever declared the advertisement to be libelous. Curran's testimony simply does not support the petitioner's desired conclusion. Rather, Curran testified at his deposition:

Q. Did you believe the matters set forth in this advertisement were false?

A. I did not know if they were false. I did not know if they were true.

(Record at 74).

Curran did not even express any doubts as to truth of the matter. He simply did not know. Curran was concerned about the *propriety* of the use of the newspaper's name in the footnotes of the advertisement. He testified at deposition:

A. I said it [the advertisement] was bullshit.

Q. And why did you say that?

A. I said it because it appeared to be, and was, a listing of specific apparent charges from one candidate to another, *and using as reference points,* these numbers which appeared, which *reference to footnotes,* and which included in them were the Geauga Times Leader. The Geauga Times Leader was our newspaper, and I said, "it is bullshit. We can't use this."

Q. Why could you not use that, in your judgment?

A. In my judgment, to have specific charges of possible wrongdoing referring to our newspaper by name as the source of this information would be a problem to us *if* these charges were not accurate. *It would be a problem to us, anyway, because it would appear that we were supporting one candidate in an advertisement prepared by another.* It would appear we were giving it our imprimatur, for one. But, secondly, that we were justifying these charges and the—how can I word it?

Q. All right. Go ahead sir.

A. When you see something that says, $11,000,000 of unopened tax receipts lay in her vault "idle," she is the treasurer of the county. Her

job is to deal with money, that is her elected position. To say that we said that she misused the money, what *if* she didn't?

I said—the term was, "It is bullshit." Followed by, "*If* these aren't right, at all, in any way, and we can get sued, *if* there is a libel, we can be included because our name is included."

Q. In the footnotes?

A. In the footnotes.

(Record at 53-54) (Emphasis added).

Curran's statements, contrary to the petitioner's assertions contained in her Petition's statement of facts *do not* conclude that the advertisement was in his opinion "libelous" and *do not* voice "serious reservations about the truthfulness" of the advertisement (*See* Petition for Writ of Certiorari, p. 6).

Petitioner next attempts to build upon her weak foundation as she incorrectly concludes that Curran's statements evidence a high degree of awareness of probable falsity *and then attempts to impute this false assumption to the general manager,* Herbert Thompson. Petitioner's assertion, as demonstrated earlier, is unfounded as there is no evidence that Curran knew the advertisement was false or had serious suspicions as to the truth of the matter. Also, there is no evidence which indicates that Thompson knew the advertisement was false or had a high degree of awareness of its probable falsity. Petitioner's assertions regarding Thompson are simply groundless.

Petitioner, in passing (Petitioner's statement of facts, Petition for Writ of Certiorari at p. 6), asserts that the respondent made no efforts to verify or corroborate

the statements and a simple check of prior news articles, documents in its possession or questions of its reporters would have disclosed the falsity of the statements.

The Ohio Supreme Court relying upon the prior rulings of the United States Supreme Court strongly rejected this contention as a "mere failure to investigate the accuracy of a news story cannot, by itself, establish liability." *St. Amant* at 733. (*See* Appendix to Petition for Writ at A12).

Therefore petitioner's assertions regarding the duty of the respondent in this action to investigate or research the accuracy of an advertisement are groundless.

The evidence and record of this action demonstrate that the Ohio Supreme Court properly stated and applied the correct standard regarding the burden of a public official when trying to overcome a defendant's motion for summary judgment in a defamation action.

II. PETITIONER HAS FAILED TO RAISE OR PRESERVE THE CONSTITUTIONAL ISSUE REGARDING THE RIGHT TO A JURY TRIAL AND OPEN ACCESS TO THE COURTS FOR WHICH IT NOW SEEKS REVIEW.

Petitioner in her Petition for Writ of Certiorari admits that these constitutional issues were not previously addressed. Petitioner has failed to raise, present, or preserve the specific right to a jury trial and open access to the court's issues which it now seeks to introduce.

Ohio's courts have held, "It has long been the rule of this Court that the syllabus contain the law of the case." *State ex rel. Donohey v. Edmondson* (1913), 89 Ohio St. 93, 107-108. *See Beck v. Ohio* (1964), 379 U.S. 89, 93.

This principle of law is also set forth in Rule 1(B) of the Ohio Supreme Court Rules for the reporting of opinions and states:

> The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the court for adjudication.

Therefore, the only matters decided by the Court are found in its syllabus.

The United States Supreme Court has consistently held that where, as is evident here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts." *Street v. New York* (1969), 394 U.S. 576, 582. The policy considerations including the need to insure a sound and accurate record, and the requisite that the state's highest court first actually decide the constitutional issue are well established and require that the petitioner demonstrate that the issue was presented to and decided by the Court which is now subject to review. *Hill v. California* (1971), 401 U.S. 797.

Petitioner by her own admission has failed to raise, present or preserve the very issue for which she now seeks review. Respondent states, therefore, that a review of this issue should be denied.

Respondent further states that petitioner's assertions are without merit in that the reasons set forth regarding the failure to previously raise this issue are groundless. The general posture and basic issues of this action have not changed during the adjudication by Ohio's courts.

As established earlier in this brief the actual malice test was correctly stated and applied by the Ohio Supreme Court pursuant to the long established holdings of the United States Supreme Court. Petitioner's vague assertions that the Ohio Supreme Court somehow applied a more stringent standard of the actual malice test are without merit and are utterly groundless.

The petitioner next asserts that the Ohio Supreme Court inappropriately weighed the evidence pursuant to an independent review of the same. Ohio's courts and the United States Supreme Court have agreed that in cases of this type an independent review is necessary and encouraged. The court has an obligation to undertake an independent "examination of the whole record, in order to make sure that the judgment [below] does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union* (1984), 466 U.S. 485, 499, *see Grau v. Kleinschmidt* (1987), 31 Ohio St. 3d 84, 92-94. It is also well established that: "[c]lose judicial scrutiny [is required] to ensure that cases about types of speech and writing essential to a vigorous First Amendment do not reach the jury." *Ollman v. Evans* (D.C. Cir. 1984), 750 F.2d 970, 997.

It is submitted that petitioner's contentions are groundless. The Ohio Supreme Court has properly stated and applied the correct standard for a case of this type and has properly fulfilled its obligation to independently examine the whole record.

CONCLUSION

For the foregoing reasons, respondent urges the United States Supreme Court to deny the instant Petition.

Respectfully submitted,

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